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**FEDERAL ELECTION COMMISSION**  
999 E Street, N.W.  
Washington, D.C. 20463

**FIRST GENERAL COUNSEL'S REPORT**

**SENSITIVE**

MUR: 5075

DATE COMPLAINT FILED: August 21, 2000

DATE OF NOTIFICATION: August 28, 2000

DATE ACTIVATED: December 13, 2000

EXPIRATION OF STATUE OF

LIMITATIONS: July 20, 2005

STAFF MEMBER: Mary L. Taksar

COMPLAINANT: Donald F. McGahn, II  
General Counsel, National Republican Congressional  
Committee

RESPONDENTS: Patrick Casey, Casey for Congress Committee and  
Richard L. Eckersley, as Treasurer, Pennsylvania Democratic  
Party and James Byrnes, as Treasurer, John Glenning

RELEVANT STATUTES: 2 U.S.C. §§ 431(18), 441b, 441d(a), 441h  
11 C.F.R §§ 100.22, 110.11

INTERNAL REPORTS CHECKED: FEC Indices and Reports

FEDERAL AGENCIES CHECKED: None

**I. GENERATION OF MATTER**

This matter originated by a Complaint filed by Donald F. McGahn, II, General  
Counsel to the National Republican Congressional Committee. The Complaint alleges  
that, during the 2000 Congressional elections, agents of Patrick Casey, the Casey for  
Congress Committee, and the Pennsylvania Democratic Party misrepresented themselves  
as supporters of John McCain in violation of 2 U.S.C. § 441h, and distributed campaign  
materials expressly advocating the election of Patrick Casey without appropriate  
disclaimers in violation of 2 U.S.C. § 441d. See Complaint, pages 1-3. The Complaint

1 further alleges that these violations were knowing and willful. *Id.* at 3. The Casey for  
 2 Congress Committee is the principal campaign committee of Patrick Casey, the  
 3 Democratic candidate in the 2000 election in Pennsylvania's 10<sup>th</sup> Congressional District.<sup>1</sup>

4 **II. FACTUAL AND LEGAL ANALYSIS**

5 **A. Law**

6 The Federal Election Campaign Act of 1971, as amended, ("the Act") states:

7 No person who is a candidate for Federal office or an employee or agent of  
 8 such a candidate shall—

- 9 (1) fraudulently misrepresent himself or any committee or  
 10 organization under his control as speaking or writing or otherwise  
 11 acting for or on behalf of any other candidate or political party or  
 12 employee or agent thereof on a matter which is damaging to such  
 13 other candidate or political party or employee or agent thereof; or  
 14 (2) willfully and knowingly participate in or conspire to participate  
 15 in any plan, scheme, or design to violate paragraph (1).  
 16

17 2 U.S.C. § 441h.

18 The Act further states:

19 Whenever any person makes an expenditure for the purpose  
 20 of financing communications expressly advocating the  
 21 election or defeat of a clearly identified candidate, or solicits  
 22 any contribution through any broadcasting station,  
 23 newspaper, magazine, outdoor advertising facility, direct  
 24 mailing or any other type of general public political  
 25 advertising, such communication—

26 (1) if paid for and authorized by a candidate, an  
 27 authorized political committee of a candidate, or its agents,  
 28 shall clearly state that the communication has been paid for  
 29 by such authorized political committee, or

30 (2) if paid for by other persons but authorized by a  
 31 candidate, an authorized political committee of a candidate,  
 32 or its agents, shall clearly state that the communication is  
 33 paid for by such other persons and authorized by such  
 34 authorized political committee;

35 (3) if not authorized by a candidate, an authorized  
 36 political committee of a candidate, or its agents, shall clearly  
 37 state the name of the person who paid for the communication

<sup>1</sup> Casey lost the election, his second loss to Republican opponent Don Sherwood, by a margin of 47 to 53 percent.

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and state that the communication is not authorized by any candidate or candidate's committee.

2 U.S.C. § 441d(a). Commission regulations require the disclaimer to be presented in a clear and conspicuous manner to give the reader adequate notice of the identity of the person or committee who paid for, and, where required, that authorized the communication. 11 C.F.R. § 110.11(a)(5). "Person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons excluding the Federal government or any authority of the Federal government. 2 U.S.C. § 431(11). Pursuant to 11 C.F.R. § 100.22, the term "expressly advocating" means any communication that uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "Smith for Congress," or "Bill McKay in '94" or communications of campaign slogans or individual word(s) which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates. The term "clearly identified" means that the name, photograph, or drawing of the candidate involved appears or the identity of the candidate is apparent by unambiguous reference. 2 U.S.C. § 431(18).

## **B. The Complaint**

### **1. Misrepresentation**

The allegations made in the Complaint are based on a newspaper article in the *Towanda Daily Review* ("Daily Review") of August 6, 2000.<sup>2</sup> See Complaint, pages 5-6. The *Daily Review* is a regional daily newspaper serving Bradford and Sullivan counties in Pennsylvania's 10<sup>th</sup> Congressional District. The *Daily Review* article is derived from an

<sup>2</sup> Igoe, Bob, "Casey's camp accused of spying on opposition," *Towanda Daily Review*, August 6, 2000 at 1A.

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1 interview with Wysox Township Supervisor Doug McLinko, a supporter of winning  
2 Republican candidate Don Sherwood, during which he states:

3 [T]wo young men who support Democrat Pat Casey, a Scranton attorney,  
4 lied to get into a meeting of Sherwood supporters . . . . "They told us that they  
5 were supporters of Republican Sen. John McCain and asked to sit in on our  
6 meeting. After the meeting, though, they were really evasive with us when we  
7 asked them some questions. They just took off in their cars as fast as they  
8 could . . . ."

9  
10 *Id.* at 5.

11 Based on the above-noted account in the *Daily Review*, the Complaint alleges that the  
12 two men, who identified themselves as being with Senator John McCain's operation in  
13 order to obtain access to an opponent's campaign meeting, were agents of the Casey for  
14 Congress Committee or the Pennsylvania Democratic Party and their actions constituted  
15 political "dirty tricks" prohibited by 2 U.S.C. § 441h.

16 **2. Disclaimer**

17 The Complaint alleges that a flyer expressly advocating the election of  
18 Patrick Casey and lacking a disclaimer was distributed by the same two men at the  
19 Democratic Party booth at the Troy fair. See Complaint, page 3. The literature is  
20 described as a one-page, black and white printed flyer titled "Do you want dumps in  
21 Susquehanna County?" *Id.* at 7. The flyer appears to criticize Congressman  
22 Don Sherwood's position on dumping and concludes: "Elect Pat Casey to Congress before  
23 it is too late!!!" *Id.*

24 **C. Response to the Complaint**

25 Respondents Patrick Casey, the Casey for Congress Committee and Richard L.  
26 Eckersley, as Treasurer, and the Pennsylvania Democratic Party and James Byrnes, as

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Treasurer, jointly deny the allegations in the Complaint, and submit notarized statements and evidence that contradict its claims.<sup>3</sup> See Response.

### 1. Misrepresentation

Respondents characterize the meeting that the two young men attended as an advertised public meeting and assert that none of the Respondents, Patrick Casey, Casey for Congress, or the Pennsylvania Democratic Party “had any involvement whatsoever in the two volunteers’ ill-considered decision to attend a public meeting at which they were not welcome.”<sup>4</sup> See Response, page 4. Nevertheless, after determining the identity of the two individuals, Jason Young and Joshua Bushey, Respondents requested that the volunteers respond personally to Mr. McLinko’s “false, partisan allegations about the public meeting.” *Id.* Attached to the Response and incorporated by reference is the notarized statement of Jason Young. *Id.* at 11.

In his statement, Mr. Young asserts that he and Joshua Bushey do volunteer work for and support the Democratic Party and, in fact, attended the meeting in question. *Id.* According to Mr. Young, it was their belief that Mr. McLinko would not have advertised the meeting had it not been open to the public. *Id.* He states that “at no time were we under orders or cleared by Casey for Congress or the Pennsylvania Democratic Party to attend this meeting. Equally, we at no time misrepresented our political affiliations in any

<sup>3</sup> In response to the Complaint, the Pennsylvania Democratic Party submitted a letter indicating that it had adopted the Response of the Casey for Congress Committee as its own and attached a copy of the Casey Committee’s Response. See Response from Pennsylvania Democratic Party.

Respondents argue that the Complaint is defective because Donald McGahn, II, the Complainant, failed to sign and swear to its content under penalty of perjury. See Response, page 3. Because the Complaint was subscribed and sworn to before a notary, and because the Commission accepts complaints containing allegations based upon information and belief, this Office considers the Complaint sufficient to meet the requirements of 2 U.S.C. § 437g and 11 C.F.R. § 111.4.

<sup>4</sup> Attached to the Response is a copy of the meeting announcement in the July 17, 2000 edition of *The Daily Review*. See Response, page 10.

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1 way at the meeting.” *Id.*

2 While Respondents dispute the Complaint’s factual assertions that the two men  
3 misrepresented themselves, they also argue that even if the young men misrepresented  
4 themselves as McCain supporters, no damage occurred as the result of their attendance at  
5 the meeting. *Id.* at 6. Respondents state that this conclusion is supported by  
6 Mr. McLinko’s statement that there were no important campaign secrets that were  
7 discussed at the meeting. *Id.* Respondents further argue that Section 441h was passed to  
8 prevent “push” calls, anonymous negative mail and other instances where one campaign  
9 engages in efforts to smear the other side under the cover of anonymity or a false identity  
10 and does not apply to factual circumstances in this matter. *Id.*

11 **2. Disclaimer**

12 Respondents deny the allegation that the same two young men who attended the  
13 meeting also distributed Casey campaign literature without proper disclaimers. In denying  
14 this allegation, Respondents again refer to Mr. Young’s statement, which declares that  
15 Messrs. Young and Bushey did not distribute the election material apparently referenced in  
16 the Complaint. See Response, page 11. According to Mr. Young:

17 At no time have we distributed any election material apparently referenced  
18 in the Republican complaint about our activity. It is our understanding that the  
19 Republicans are blaming us for documents printed by someone totally unaffiliated  
20 with the Democratic Party. We only distribute those materials duly authorized and  
21 paid for by the respective candidates in Northeastern Pennsylvania.

22  
23 *Id.*

24 Attached to the Response is a notarized statement from John Glenning, a  
25 community activist, in which he asserts that he created the flyer attached to the Complaint  
26 and the Casey campaign and Democratic Party “had nothing to [do] with this document.  
27 They were completely unaware of this document, provided no funds and did not distribute

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1 this document.” *Id.* at 12. As part of their Response, Respondents also submitted a copy  
2 of a letter that the Casey for Congress Committee sent to Mr. Glenning. *Id.* at 13. The  
3 letter states that while the Committee does not want to infringe upon his right of  
4 expression, given the complexity of Federal Election laws, it requests that in the future he  
5 identify himself as the author of any literature expressing his personal opinion. *Id.*

6 **D. Analysis**

7 **1. Misrepresentation**

8 The Complaint’s allegation of misrepresentation is based on Mr. McLinko’s  
9 account in the *Daily Review* that in order to get into what he describes as a meeting of  
10 Sherwood supporters, two young men working for Patrick Casey lied by claiming that they  
11 were supporters of Senator John McCain. According to the *Daily Review*, in response to  
12 this account, Charlie Lyons, a spokesman for the Casey campaign, stated that while it was  
13 possible that the two men in question were Democratic Party volunteers, they were not  
14 acting under orders from the Casey campaign; “[w]e would not condone that . . . I made  
15 some calls and verified that there may have been two Democratic supporters at the  
16 meeting, but they were not Casey employees.” See Response, page 9. Respondents argue  
17 that the two men did not misrepresent themselves at the meeting and were not agents of the  
18 Casey for Congress Committee or the Pennsylvania Democratic Party as evidenced by  
19 Mr. Young’s statement. Respondents further argue that even if the two had stated they  
20 were McCain supporters, this statement does not constitute misrepresentation in violation  
21 of 2 U.S.C § 441h. *Id.* at 3-4.

22 The Act bars a person who is a candidate for Federal office or employee or agent of  
23 the candidate from fraudulently misrepresenting himself as speaking, writing or acting for  
24 or on behalf of any other candidate “on a matter which is damaging to *such other*

1 candidate . . . .”<sup>5</sup> (emphasis added). 2 U.S.C. § 441h. The language in Section 441h refers  
 2 to damage to the candidate or political party who is misrepresented, in this instance,  
 3 Senator John McCain. The Complaint does not claim that Senator McCain was damaged  
 4 by Messrs. Young and Bushey’s participation in the meeting or the alleged  
 5 misrepresentation, and it does not appear to this Office that any such damage occurred.<sup>6</sup>

6 Even if Messrs. Young and Bushey falsely stated at the meeting that they were  
 7 supporters of Senator McCain, their action is not the type of fraudulent misrepresentation  
 8 or “dirty tricks” that 2 U.S.C. § 441h is designed to prevent. Neither the Complaint nor the  
 9 *Daily Review* assert that Messrs. Young or Bushey claimed they had Senator McCain’s  
 10 authority to speak or act for him, they merely allege, and Respondents deny, that  
 11 Messrs. Young and Bushy stated that they were McCain “supporters.” An individual may  
 12 “support” a candidate without being employed by or acting as an agent of that candidate.

13 In summary, even if the Complaint’s allegations are accepted as true, Messrs. Young  
 14 and Bushey’s statement at the meeting that they supported Senator John McCain does not  
 15 constitute misrepresentation prohibited by 2 U.S.C. § 441h and caused no damage to  
 16 Senator John McCain. Therefore, this Office recommends that the Commission find no  
 17 reason to believe that Patrick Casey, the Casey for Congress Committee and Richard L.  
 18 Eckersley, as Treasurer, and the Pennsylvania Democratic Party and James Byrnes, as  
 19 Treasurer, violated 2 U.S.C. § 441h.

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<sup>5</sup> The Department of Justice (“DOJ”) interprets the provision to prohibit fraudulent misrepresentation of “*authority to speak or act for another federal candidate.*” (emphasis added) (U.S. Department of Justice, Criminal Division, *Federal Prosecution of Election Offenses*, 6<sup>th</sup> Edition, January, 1995 at 104).

<sup>6</sup> Respondents “counterclaim,” in fact, that Patrick Casey was damaged. According to Respondents, the Sherwood campaign misled the *Daily Review* to create negative publicity that the Complainant National Republican Congressional Committee used in an attack ad and “fax-blasted” throughout Pennsylvania’s 10<sup>th</sup> Congressional district. See Response, page 6. These claims are not analyzed in this Report because they are not part of the Complaint.

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## 2. Disclaimer

The Complaint, again citing Mr. McLinko's claims to the *Daily Review*, alleges that he later saw the same two young men at the Troy fair wearing shirts with Casey logos and handing out campaign literature that criticized Congressman Don Sherwood. See Complaint, page 6. According to Mr. McLinko, he approached the men and told them that what they had done at the meeting was wrong. *Id.* Mr. McLinko states that during the ensuing conversation, the men admitted that they were working for Casey. *Id.* Neither the Complaint nor the *Daily Review* article discusses whether Mr. McLinko obtained a copy of the literature the young men were distributing; however, a copy of a flyer titled "Do you want dumps in Susquehanna?" is attached to and identified in the Complaint as the material that was distributed by the two men at the Troy fair. The flyer appears to criticize Congressman Sherwood's alleged position on waste dumps and concludes: "Elect Pat Casey to Congress before it is too late!!!" *Id.* at 7.

The *Daily Review* article indicates that the newspaper could not locate the two young men described by Mr. McLinko as distributing literature at the fair, but instead acquired a copy of a flyer that the Democratic Party distributed from its booth there. *Id.* at 6. The *Daily Review* describes a flyer that is titled "An important message from your union" and is completely different from the dumping flyer attached to the Complaint. Thus, two different flyers are at issue, the "dumping" flyer attached to the Complaint and the "union" flyer described in the *Daily Review* article, each of which is discussed below.

### a. Dumping Flyer

As noted earlier, the Complaint alleges that the dumping flyer is the literature that Messrs. Young and Bushey were distributing at the Democratic Party booth at the Troy fair. Respondents deny that they or any of their employees or agents "ever distributed

1 materials constituting express advocacy without the appropriate disclaimer notices." See  
2 Response, page 5. Mr. Young's statement supports the Respondents' claim that Messrs.  
3 Young and Bushey did not distribute the literature referenced in the Complaint.

4 Respondents further assert that "[t]he literature appended to the Republicans'  
5 Complaint was designed, printed, paid for and circulated by a private citizen totally  
6 unaffiliated with the [Respondents] . . . or with any employees or agents thereof." *Id.*  
7 Respondents provide a statement from John Glenning in which he confirms that  
8 Patrick Casey, the Casey for Congress Committee and the Pennsylvania Democratic Party  
9 had no knowledge of or any involvement with the dumping flyer attached to the Complaint.

10 This Office considers Mr. Glenning's statement, as well as the *Daily Review's*  
11 inability to locate the dumping flyer, to be persuasive evidence that Respondents did not  
12 distribute campaign materials without appropriate disclaimers. Therefore, this Office  
13 recommends that the Commission find no reason to believe Patrick Casey, the Casey for  
14 Congress Committee and Richard Eckersley, as Treasurer, and the Pennsylvania  
15 Democratic Party and James Byrnes, as Treasurer, violated 2 U.S.C. § 441d.

16 In contrast, this Office finds sufficient evidence in the Complaint and Response to  
17 support a finding of reason to believe that John Glenning violated 2 U.S.C. § 441d(a)(3).  
18 The flyer expressly advocates the election of a clearly identified candidate, Patrick Casey,  
19 by stating, "Elect Pat Casey to Congress before it is too late!!!" Consequently, the  
20 dumping flyer, which was not authorized by Patrick Casey, the Casey for Congress  
21 Committee, the Pennsylvania Democratic Party or any of their agents, should have clearly  
22 stated the name of the person who paid for the communication and that the communication  
23 was not authorized by any candidate or candidate's committee. The flyer contains no such  
24 disclaimer. Therefore, this Office recommends that the Commission find reason to believe

1 that John Glenning violated 2 U.S.C. § 441d(a)(3).<sup>7</sup> This Office is simultaneously  
 2 recommending that the Commission take no further action against Mr. Glenning based on  
 3 the absence of an allegation or other available information that the distribution of the flyer  
 4 was widespread, and because further investigation and pursuit of a civil penalty would not  
 5 be an efficient use of the Commission's limited resources.<sup>8</sup> However, this Office  
 6 recommends that the Commission's notification letter to Mr. Glenning include an  
 7 admonishment.

8 **b. Union Flyer**  
 9

10 As noted earlier, the *Daily Review* article indicates that the newspaper acquired a  
 11 copy of the flyer titled "An important message from your union" that the Democratic  
 12 Committee distributed from its booth at the Troy fair, an entirely different flyer from the  
 13 dumping flyer that was attached to the Complaint. According to the *Daily Review*, the  
 14 union flyer is a one-page, black and white document that lists no funding source, does not  
 15 credit any source for its information, and encourages residents to call a toll free number to  
 16 criticize Congressman Sherwood for voting to "squander America's budget surplus on a  
 17 \$792 billion tax cut for the rich and Big Business." See Complaint, page 6. The *Daily*  
 18 *Review* does not discuss the text of the union flyer in sufficient detail to enable this Office

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<sup>7</sup> This Office notes that Mr. Glenning is being internally generated as a Respondent in this matter; he was not notified of the Complaint because he was not mentioned or named as a Respondent in the Complaint. This Office learned of his identity and involvement with the flyer through the Casey for Congress Committee's Response to the Complaint and the statement that Mr. Glenning provided to the Committee.

In Mr. Glenning's statement, he requests that the Commission not publicly disclose his name and involvement with the flyer in fear of retaliation. See Response, page 12. However, this Office notes that the Commission does not exempt the identity of a Respondent from the public record. Because Mr. Glenning will be internally generated as a Respondent in this matter, his name and the details of his involvement will be placed on the public record when the matter is closed.

<sup>8</sup> This Office notes that if Mr. Glenning spent more than \$250 on the flyer, he was also required to report the independent expenditures pursuant to 2 U.S.C. § 434(c) and 11 C.F.R. § 109.2, an issue which would be pursued if the Commission conducted an investigation.

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1 to determine whether it expressly advocates the election or defeat of a clearly identified  
 2 candidate, and does not print a copy of the flyer. However, the *Daily Review* quotes  
 3 Congressman Sherwood as stating "this flyer is left over from last year . . . . Even so, these  
 4 charges are still wrong just as they were then." *Id.*

5 If the union flyer expressly advocates the election or defeat of a clearly identified  
 6 candidate, any person paying for it should have included a disclaimer stating who paid for  
 7 it and whether or not it was authorized by the candidate or candidate's committee.  
 8 However, neither the Complaint nor the Response make any mention of the union flyer and  
 9 the limited available information does not indicate that the flyer expressly advocates the  
 10 election or defeat of a Federal candidate. This Office believes that the additional  
 11 investigation required to determine whether there was a violation of Section 441d would  
 12 not be an efficient use of the Commission's limited resources.<sup>9</sup> Therefore, this Office  
 13 makes no recommendation regarding the union flyer.

### 14 **III. RECOMMENDATIONS**

15  
 16 1. Find no reason to believe Patrick Casey, the Casey for Congress  
 17 Committee and Richard L. Eckersley, as Treasurer, and the Pennsylvania Democratic Party  
 18 and James Byrnes, as Treasurer, violated 2 U.S.C. §§ 441h and 441d.

19  
 20 2. Find reason to believe John Glenning violated 2 U.S.C. § 441d(a)(3) but take  
 21 no further action against him.

22  
 23 3. Approve the attached Factual and Legal Analysis and appropriate letters.  
 24  
 25  
 26  
 27

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<sup>9</sup> Additionally, the flyer's title "An important message from your union" makes the flyer appear to this Office to have been prepared and paid for by an unidentified union. If this is the case, in order to avoid violating 2 U.S.C. § 441b which prohibits contributions by labor organizations, the unidentified union would also have had to pay for the flyer through a separate, segregated fund. Again, neither the Complaint nor the Response provide information on how the unidentified union may have financed the flyer, and additional investigation required to determine this issue also would not be an efficient use of the Commission's limited resources.

1 4. Close the file.  
2  
3

Lois G. Lerner  
Acting General Counsel

4  
5  
6  
7 9/6/01  
8 Date

BY:

Abigail A. Shaine  
Abigail A. Shaine  
Acting Associate General Counsel

9  
10  
11 Attachment

12 Factual and Legal Analysis for John Glenning  
13  
14

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21-04-405-2095



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

**MEMORANDUM**

**TO:** Office of the Commission Secretary

**FROM:** Office of General Counsel

**DATE:** September 6, 2001 *KCS*

**SUBJECT:** MUR 5075 – First General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of \_\_\_\_\_

Open Session \_\_\_\_\_

Closed Session \_\_\_\_\_

**CIRCULATIONS**

**SENSITIVE** ☒  
**NON-SENSITIVE** ☐

72 Hour TALLY VOTE ☒

24 Hour TALLY VOTE ☐

24 Hour NO OBJECTION ☐

INFORMATION ☐

96 Hour TALLY VOTE ☐

**DISTRIBUTION**

**COMPLIANCE** ☒

Open/Closed Letters ☐  
MUR ☐  
DSP ☐

**STATUS SHEETS** ☐  
Enforcement ☐  
Litigation ☐  
PFESP ☐

**RATING SHEETS** ☐

**AUDIT MATTERS** ☐

**LITIGATION** ☐

**ADVISORY OPINIONS** ☐

**REGULATIONS** ☐

**OTHER** ☐


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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

MEMORANDUM

TO: Lois Lerner  
Acting General Counsel

FROM: Office of the Commission Secretary 

DATE: September 10, 2001

SUBJECT: MUR 5075 - First General Counsel's Report  
dated September 6, 2001.

The above-captioned document was circulated to the Commission  
on Thursday, September 6, 2001.

Objection(s) have been received from the Commissioner(s) as  
indicated by the name(s) checked below:

Commissioner Mason	<u>XXX</u>
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Smith	—
Commissioner Thomas	—
Commissioner Wold	—

This matter will be placed on the meeting agenda for

Wednesday, September 19, 2001.

Please notify us who will represent your Division before the Commission on this  
matter.

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